No. 13-18-00486-CV

IN THE THIRTEENTH COURT OF APPEALS

CALHOUN PORT AUTHORITY,
Defendant/Appellant,

v.

VICTORIA ADVOCATE PUBLISHING CO.,
Plaintiff/Appellee.

Appealed from 135th District Court
Calhoun County, Texas
Cause No. 2018-CV-3354-DC
Hon. Robert E. Bell

MOTION FOR REHEARING OF PLAINTIFF/APPELLEE VICTORIA ADVOCATE PUBLISHING CO.

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Introduction

The Court, in its Memorandum Opinion of April 11, 2019 (Exh. 1), erred in holding that the resignation of Blake Farenthold completely mooted this action by the Victoria Advocate Publishing Co. ("Advocate").[1] The holding is contrary to binding precedent in *Lugo v. Donna ISD Bd. of Trs.*, 557 S.W.3d 93 (Tex. App.–Corpus Christi 2017, no pet.), and contrary to the Texas Supreme Court opinions with which *Lugo* is consistent: *State ex rel. Best v. Harper*, 562 S.W.3d 1 (Tex. 2018), and *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640 (Tex. 2005).

In another important respect, the Court's holding is also inconsistent with *Cox Enters., Inc. v. Bd. of Trs. of the Austin ISD*, 706 S.W.2d 956 (Tex. 1986), and *Acker v. Texas Water Comm'n*, 790 S.W.2d 299 (Tex. 1990).

In order to remain harmonious with these binding precedents, the Court should decide all of the issues identified as not moot in the Advocate's Advisory to the Court dated January 16, 2019, and discussed in detail below.

[1] It is not entirely clear whether the Court's holding is that the resignation *alone* completely mooted this action, or whether the Court accepted some or all of the mootness arguments that the CPA made in its opening brief *before the resignation*. But the Court's language points toward the first of these as the more likely.

Background of the Mootness Issue

The Advocate sued the CPA on discrete claims for violations of the Texas Open Meetings Act ("TOMA"), for which it also sought relief under the Uniform Declaratory Judgment Act. Primarily, it claims the CPA's governing board met in closed session on May 9, 2018 (all dates are 2018 unless noted otherwise) without having provided adequate prior notice of the subject of the closed session as required by TOMA (3CR 678-79 at ¶ 10), so the session was illegal (*id.* at 679 at ¶ 11). For these violations, the Advocate sought a declaratory judgment (*id.* at 683 at ¶ 1), and publication of the certified agenda, i.e., the record of the illegal closed session (*id.* at 679 at ¶ 11 & 681 at ¶ 14). It also claimed the illegal closed session led to the directive to hire Mr. Farenthold, so his hiring was a voidable action under TOMA (*id.* at 679 at ¶ 11), for which the Advocate sought an injunction that reversed or voided the hiring (*id.* at 683 at ¶ 2). The Advocate also claimed the CPA provided inadequate prior notice of a subject to be discussed in open session at a meeting on May 24 (3CR 681 at ¶ 14), and that the certified agendas of the closed session on May 9 and another closed session on May 24 were inadequate records of the closed sessions on those dates (3CR 680-81 at ¶¶ 13-14[2]). The Advocate prayed

[2] The Advocate alternatively claimed that the CPA did not record either closed sessions (the Open Meetings Act requires either a certified agenda or a recording). The CPA later submitted under seal to the district court a certified agenda for May 9 closed session, but the district court has had no occasion to rule on its adequacy.

for appropriate declaratory relief (*id.*), as well as for an injunction to prevent future violations of TOMA (3CR 683 at ¶ 2). With respect to the action as a whole, the Advocate prayed for an award of its reasonable fees and costs. (3CR 683 at ¶ 3.)

As the action progressed in the district court and then moved into this Court, Mr. Farenthold remained a CPA employee.[3] The CPA's initial appellate argument about mootness was limited to contending that the Advocate's claims about the inadequacy of the closed-session notice for May 9, the illegality of that closed session, and the voidability of Mr. Farenthold's hiring were mooted by what the CPA characterized as remedial actions at its meeting on May 24. (CPA Br. 21-25.)

The Advocate's brief countered the CPA's limited mootness arguments (Advocate Br. 15-19 & 28-30), and addressed each of the non-mootness arguments. But after the parties filed their principal briefs, Mr. Farenthold resigned his employment with the CPA. The Advocate duly advised the Court of this factual development, and of its position that the resignation mooted *only* the Advocate's claim for an injunction to void the hiring of Mr. Farenthold pursuant to the CPA's unlawful actions on May 9, and nothing else.

The CPA's reply brief again put forward a combination of mootness and non-mootness arguments for finding the action non-justiciable (though the

[3] CPA Br. 5 ("Mr. Farenthold remains employed as Legislative Liaison for the Port Authority").

post-resignation mootness arguments were somewhat more expansive than the pre-resignation mootness arguments). The Court did not request supplemental briefing on mootness. On April 11, it issued a Memorandum Opinion (Exhibit 1), holding that "all of the Advocate's claims are now moot" because, in the panel's words, the hiring of Mr. Farenthold was "effectively reversed." (Exh. 1 at 7). With respect to the claim for an injunction to prevent future violations, the Court held that no such injunction could be premised on allegations about past violations that had become moot, and that the Advocate pleaded no allegation—i.e., no allegation beyond the now-moot ones about past violations—that pointed toward the possibility of future violations that a prospective injunction might be necessary to prevent. (Exh. 1 at 7-8.)

Argument: The Court's Points of Error

The Court erred in the following respects:

The claims relating to the May 9 meeting: The claims for declaratory relief regarding the inadequacy of the notice for the closed session on May 9, and regarding the consequent illegality of the closed session, are not moot. This Court made clear in *Lugo* that when the only substantive relief for an alleged TOMA violation is declaratory, the case is not moot as long as fees remain awardable. The plaintiff, Lugo, alleged that the defendant illegally departed from a meeting notice

by taking an action— appointing two people to fill the unexpired terms of two trustees who resigned— that was not included in the meeting notice, and that their appointments were voidable. 557 S.W.3d at 95. Lugo lost on summary judgment in the trial court—he did *not* prevail—and while his appeal was pending the two appointed trustees left the board, so there were no appointments to void: the only relief available to Lugo was a declaration that the defendant violated TOMA.

With significant reliance on *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640 (Tex. 2005), the Court held that the claim for declaratory relief was not moot: "it matters not whether Lugo's appellate argument ultimately succeeds or fails on the merits because Lugo's remaining interest in obtaining attorney's fees if he were to prevail on appeal prevents it from becoming moot." *Lugo*, 557 S.W.3d at 97. Hence, the Court proceeded to determine the merits of the parties' cross-motions for summary judgment.

The CPA cites, as noted above, the Texas Supreme Court's distinguishable —from *Hallman*, from *Lugo*, and from this case—decision in *Glassdoor, Inc. v. Andra Group, LP*, 2019 WL 321934, at *6 (Tex. Jan. 25, 2019) ("when a party seeks attorney's fees under a prevailing-party statute ..., the claim for fees remains a live controversy if the party prevailed before the underlying claim became moot"). *Glassdoor* is not on point because it dealt with a fee-shifting statute that requires the

claimant to be prevailing party, 2019 WL 321934, at *6, but *Hallman* dealt with a claim for fees under the UDJA, which does not require a fee claimant to be a prevailing party.[4] Hence, *Hallman* held a claimant's "remaining interest in obtaining attorney's fees 'breathes life' into this appeal and prevents it from being moot." 159 S.W.3d at 643.

The Texas Supreme Court recently, in *State ex rel. Best v. Harper*, 562 S.W.3d 1 (Tex. 2018), underscored this crucial difference between fee-shifting under a statute that requires prevailing party status, and one that does not, when it cited *Hallman* and described thus its holding: "holding that an attorney's-fees claim based on a statute that allows fee awards to non-prevailing parties remains live even after the underlying claim becomes moot." *Best*, 562 S.W.3d at 7.

This Court in *Lugo* followed *Hallman* (after discussing *Hallman* extensively) because Lugo's fees were awardable in part under the UDJA. *Lugo*, 557 S.W.3d at 97 ("if Lugo is correct that the Trustees violated [the Open Meetings Act], he may be entitled to attorneys' fees under [it] and the UDJA").[5] And the Advocate urged this Court to follow *Lugo*, because the Advocate pleaded for and may also be

[4] "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009.

[5] *Lugo* misinterpreted *Hallman* to the extent it held that the future possibility of fees under TOMA prevented mootness: that statute does require prevailing-party status (TEX .GOV'T CODE § 51.142(b)), unlike the UDJA.

entitled to attorney's fees under the UDJA. (Advocate Br. at 17.[6]) The Court *should* have followed *Lugo*, " because we must follow our precedent absent an intervening decision from a higher court or from this Court sitting en banc." *Matamoros v. State*, 500 S.W.3d 58, 62 (Tex. App.–Corpus Christi 2016, no pet.).Indeed, this case features more discrete claims for TOMA violations than did *Lugo*, such as the Advocate's claims regarding the unlawful convening of a closed session and failure to properly document the proceedings of closed sessions.

Instead, the Court's Memorandum Opinion fails to explain why *Hallman* and *Lugo* are distinguishable, and why the Advocate's claim for declaratory relief is moot in light of them. Clearly, the CPA was not correct in contending, in its reply brief, that *Lugo* is materially different because of what happened in the trial court (CPA Reply Br. at 14-15), where Lugo lost on summary judgment but the Advocate defeated the CPA's plea to the jurisdiction. On the contrary, the material *similarity* is that while Lugo lost his claim in the trial court on summary judgment before the specter of mootness arose, this Court still held that his chance of getting fees under the UDJA prevented the claim from becoming moot, even though the only

[6] The Advocate noted that this Court also, in *Pt. Isabel ISD v. Hinojosa*, 797 S.W.2d 176, 183 (Tex. App.–Corpus Christi 1990, writ denied), held that fees may be awarded in connection with a violation of the Open Meetings Act under either the act or under the UDJA. (Advocate Br. at 38.) The CPA's reply brief incorrectly stated that the Advocate's brief cited "no authority" for the position that it could recover fees under the UDJA. (CPA Reply Br. at 17-18.)

substantive relief if he prevailed on it would be a declaration of a TOMA violation. That is the position the Advocate is in now (with more claims than Lugo had), so the Court should proceed to decide the claims it has identified as not moot.

Lugo also demonstrates another error in this Court's reliance on Mr. Farenthold's resignation to find moot the discrete claims for declaratory relief. According to the Court, "the only *actions* which [the Advocate] seeks to 'stop, prevent, or reverse' are the decisions to hire and retain Farenthold." (Exh. 1 at 7.) On the contrary, TOMA litigation does not have to be about stopping, preventing, or reversing actions. If the Court is correct that TOMA does not accommodate declaratory litigation over some of the very things that TOMA requires—such as an adequately descriptive notice of the May 9 closed session—unless they also entail an action that a court can enjoin or mandamus, then *Lugo* was wrongly decided because that, on the merits, was all that *Lugo* was about after the appointed trustees left the board. And the Court effectively deletes from TOMA duties that the Legislature imposed.

But not just *Lugo*: the Supreme Court's decision in *Cox* was also wrongly decided if the Court's Memorandum Opinion is correct. In *Cox*, the trial court awarded a declaratory judgment that the defendant "violated various provisions" of TOMA. 706 S.W.2d at 957. The plaintiff had also requested an injunction and a

writ of mandamus, *but got neither*, *id.*, and neither was at issue during the appeal to the Supreme Court—the opinion is silent on them after the one brief reference. All that remained at issue was the trial court's declaratory judgment, which addressed three illegalities: (1) the defendant conducted closed sessions without adequate notice of the topics to be discussed in them, 706 S.W.2d at 959; (2) the defendant conducted meetings without a quorum, *id.*; and (3) the defendant took final action on three matters in closed sessions, instead of merely deliberating about them in closed sessions, *id.* The Court affirmed the declaratory judgment with respect to (1) and (2), and affirmed the appellate court's reformation of the judgment to reflect its holding that the defendant did not take final action in any closed sessions. *Id.* at 959-60.

According to the logic of this Court's Memorandum Opinion, the *Cox* Court should not have bothered with any of this because the plaintiff at that point—and if mootness arises at *any point*, the moot issue must be excised[7]—was not trying to stop, prevent, or reverse any actions that flowed from the illegal closed sessions, or any actions taken at meetings without a quorum. The plaintiff was not even trying to undo any of the three final actions the trial court found were taken in closed sessions: it was only trying to preserve the declaratory judgment on that issue.

[7] *Best*, 562 S.W.3d at 6 ("[a] case can become moot at any time, including on appeal"; "[i]f only some claims or issues become moot, the case remains 'live,' at least as to the other claims or issues that are not moot").

The reason the *Cox* Court reviewed all three aspects of the declaratory judgment, and did not hold any of them to be moot, is that TOMA is concerned not just with governmental actions, but with governmental processes. The Court made that clear a few years after *Cox* in *Acker*. Although *Acker* involved litigation to void an order issued after an allegedly illegal meeting, the *Acker* Court described TOMA's purpose in terms that transcended injunctive relief:

> Our citizens are entitled to more than a result. They are entitled not only to know what government decides but to observe how and why every decision is reached. The explicit command of the statute is for openness at every stage of the deliberations. Accordingly, we have demanded exact and literal compliance with the terms of this statute. *Smith County v. Thornton,* 726 S.W.2d 2, 3 (Tex. 1986).

Acker, 790 S.W.2d at 300.

Mr. Farenthold's abrupt resignation did not cure any of the CPA's violations of the public's right to "observe how and why every decision is reached" and the requirement of "openness at every stage of the proceedings." *Id.* The panel opinion is contrary to *Lugo* and, more importantly, to *Cox* and to *Acker*. It is also the result of an apparent misreading *Pt. Isabel* (the case that the Court cites in this portion of the Memorandum Opinion: Exh. 1 at 7). *Pt. Isabel* was concerned with defining what TOMA enables a court to void, and the answer was "actions in violation of [TOMA]." 797 S.W.2d at 182. But the answer to the question about injunctive relief has nothing to do with the answer to the question about declaratory relief, which is

what *Cox* and *Lugo* addressed, and which is what this case is now about. For example, had the Advocate originally brought only claims for the unlawful closed session, the failure of notice, and the record-keeping violations, without seeking to void the hiring of Mr. Farenthold, then the Court would face exactly what the Supreme Court in *Cox* faced: claims for declaratory relief following violations of TOMA, without any demand for reversal of actions taken by the entity. Mr. Farenthold's resignation did not moot those issues, and this Court should so hold.

Finally, because these claims regarding the notice of the closed session and the holding of the closed session are not moot, neither is the claim that the illegality of the closed session would allow the district court to issue an order requiring publication of the certified agenda for the closed session (*see* Advocate Br. 34-36).

The claims relating to the May 24 meeting: Exactly the same analysis applies to the claims for declaratory relief concerning the May 24 meeting (i.e., the certified agenda for the closed session was an inadequate record of the closed session, and the notice for the open session was inadequate (*see supra* page 2).

The claim for injunctive relief: Contrary to the Court's Memorandum Opinion, for all of the foregoing reasons the claim for prospective injunctive relief is *not* based on moot allegations about TOMA violations. In light of these not-moot allegations of four violations(two notice violations, and two recordkeeping

violations, one of each at both the May 9 and May 24 meetings), the Advocate alleged a pattern of violations that adequately supported a claim for prospective injunctive relief. (*See* Advocate Br. 31-34.)

Conclusion and Prayer for Relief

The Court should decide all the issues identified as not moot in the Advocate's Advisory to the Court dated January 16, 2019, and discussed in detail above. Upon doing so, it should affirm the trial court's judgment in all respects, as prayed for in the Advocate's appellate brief, except holding that the Advocate's request for an injunction that reverses or voids Mr. Farenthold's hiring is moot.

Date: April 26, 2019

Respectfully submitted,

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Certificate of Compliance

Pursuant to TEX. R. APP. P. 9.4(i)(3), I certify that the number of words contained in this computer-generated brief, excluding the portions listed in Rule 9.4(i)(1), as counted by the word-processing program with which it was prepared (WordPerfect X9), is 2,617.

/s/ Robert E. McKnight, Jr.
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Certificate of Service

I certify that the foregoing has been served on Calhoun Port Authority, by electronic service through its counsel of record shown below, on this 26th day of April 2019:

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NUMBER 13-18-00486-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CALHOUN PORT AUTHORITY, **Appellant,**

v.

VICTORIA ADVOCATE PUBLISHING CO., **Appellee.**

On appeal from the 135th District Court of Calhoun County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Hinojosa
Memorandum Opinion by Chief Justice Contreras

This is an appeal of an interlocutory order denying a plea to the jurisdiction in a suit brought under the Texas Open Meetings Act (TOMA). *See* TEX. GOV'T CODE ANN. ch. 551 (West, Westlaw through 2017 1st C.S.). By four issues, appellant Calhoun Port Authority (CPA) argues that the trial court erred in denying its jurisdictional challenges to

EXHIBIT 1

the suit filed by appellee Victoria Advocate Publishing Co. (the Advocate), a newspaper publisher. We vacate the trial court's judgment and dismiss the case for want of jurisdiction.

I. BACKGROUND

This case involves CPA's May 9, 2018 decision to hire former United States Representative Blake Farenthold as a lobbyist. The Advocate filed suit alleging that CPA failed to provide proper notice under TOMA that Farenthold's hiring would be deliberated or discussed at the May 9 meeting of CPA's board of commissioners.[1] The Advocate's suit asked the trial court to: (1) declare that CPA violated TOMA by deliberating and discussing the hiring of Farenthold without legally adequate notice; (2) issue an injunction "revers[ing] or void[ing]" the hiring and "prevent[ing] future violations of [TOMA]"; and (3) award costs and attorney's fees to the Advocate. The Advocate argued that the decision to hire Farenthold was "of special interest to the public" due to Farenthold's "current notoriety arising from the circumstances of his recent resignation" from Congress.

In a third amended petition, the Advocate further alleged that CPA, in response to the initial filing of suit, noticed a special board meeting for May 24, 2018. According to the Advocate, at the May 24 meeting, the board "removed the role of the Port Director" in determining Farenthold's employment—an action which the Advocate argued was also unlawful under TOMA because it was not stated in the notice. The Advocate alleged that, instead of holding a public vote on Farenthold's hiring, the board held a vote on whether

[1] According to the Advocate, the agenda posted by CPA stated only that there would be a closed session of the board to consider "the appointment, employment, compensation, evaluation, reassignment, duties, discipline or dismissal or [sic] a public officer or employee." The notice did not specifically mention Farenthold or the position he was hired for; nor did it state that the Port Director, Charles Hausmann, would consult with the board regarding the hire, as required by CPA's personnel manual. Nevertheless, the board voted in closed session on May 9 to hire Farenthold as a "legislative liaison" at an annual salary of $160,000.

to *fire* him on May 24; and because there were three votes for and three against, Farenthold remained employed by CPA. The Advocate alleged that CPA committed separate violations of TOMA by failing to properly maintain any recording or Certified Agenda for the May 9 or May 24 closed sessions.

CPA filed a plea to the jurisdiction arguing: (1) there is no justiciable controversy because the Advocate alleged no "action" that can be voided under TOMA[2]; (2) the Advocate's claims are moot due to the decisions made by the board at the May 24 meeting; and (3) there is no justiciable controversy concerning publication of the Certified Agenda of the May 9 meeting because CPA "alleges no viable basis for public disclosure of the Certified Agenda under TOMA." The Advocate filed a response. After a hearing, the trial court denied the plea. CPA later filed an amended plea to the jurisdiction addressing the claims made in the Advocate's third amended petition, which the trial court also denied.[3]

This accelerated interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West, Westlaw through 2017 1st C.S.) (allowing immediate appeal of interlocutory order denying a plea to the jurisdiction by a governmental unit); *id*. § 101.001 (West, Westlaw through 2017 1st C.S.) (defining "governmental unit" to include a navigation district); TEX. SPEC. DIST. CODE ANN. § 5003.002 (West, Westlaw through 2017 1st C.S.) (stating that CPA "is a navigation district").

[2] In particular, CPA alleged that Hausmann had the sole authority to hire Farenthold and that its board of commissioners merely consulted with Hausmann. Therefore, according to CPA, there was no action by the board which could be invalidated under TOMA.

[3] CPA also filed a motion for summary judgment and an amended motion for summary judgment; however, the record does not contain a ruling on those motions. In any event, CPA does not argue on appeal that the trial court erred in denying its summary judgment motions, and so we do not consider the issue here.

Following the initial round of briefing in this appeal, the Advocate notified this Court on January 16, 2019, that Farenthold has resigned his position with CPA, thereby rendering the Advocate's claims moot to the extent they seek to have Farenthold's hiring declared void.

II. DISCUSSION

CPA argues on appeal that the trial court erred by denying its plea for four reasons: (1) there is no justiciable controversy because the Advocate did not allege any board "action," such as a vote, that would be voidable under TOMA; (2) prospective injunctive relief is not permitted under TOMA where there is no "pattern and practice of past violations"; (3) TOMA section 551.104 does not permit a court to order publication of a Certified Agenda "based solely on a putatively inadequate meeting notice"; and (4) the Uniform Declaratory Judgments Act (UDJA) does not expand jurisdiction beyond the "limited waiver" for claims made under TOMA.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction are questions of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

We construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *See Miranda*, 133 S.W.3d at 226, 228.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do, even when the evidence implicates the merits of the cause of action. *Id*. at 227; *see City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009).

B. Applicable Law

TOMA requires that every regular, special, or called meeting of a governmental body be open to the public, with certain exceptions. TEX. GOV'T CODE ANN. § 551.002. The governmental body must give written public notice of the date, hour, place, and subject of each meeting. *Id*. §§ 551.041, .043. Generally, notice is sufficient if it informs the reader that "some action" will be considered with regard to the topic. *Lower Colo. River Auth. v. City of San Marco*s, 523 S.W.2d 641, 646 (Tex. 1975); *City of Donna v. Ramirez*, 548 S.W.3d 26, 35 (Tex. App.—Corpus Christi 2017, pet. denied). The required specificity of the notice is directly proportional to the level of public interest in the topic to be discussed. *Cox Enters., Inc. v. Bd. of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 959 (Tex. 1986); *City of Donna*, 548 S.W.3d at 35.

An action taken by a governmental body in violation of TOMA is voidable. TEX. GOV'T CODE ANN. § 551.141. "An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of [TOMA] by members of a governmental body." *Id*.

§ 551.142(a) (West, Westlaw through 2017 1st C.S.). This provision waives governmental immunity to suit for violations of TOMA's provisions and authorizes suits for mandamus or injunctive relief against governmental bodies. *City of Donna*, 548 S.W.3d at 35.[4]

C. Analysis

We must first address whether this proceeding is moot given Farenthold's resignation. A case is moot when either no live controversy exists between the parties or the parties have no legally cognizable interest in the outcome. *City of Krum, Tex. v. Rice*, 543 S.W.3d 747, 749 (Tex. 2017) (per curiam). "Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012). "A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal." *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding). When a case becomes moot, the parties no longer have standing, which requires the court to dismiss for lack of jurisdiction. *City of Krum*, 543 S.W.3d at 750.

As noted, the Advocate concedes that its underlying claims are now moot to the extent that they seek to have Farenthold's hiring invalidated or reversed. It argues,

[4] There is a split in authority regarding whether TOMA waives immunity for declaratory judgment actions. *Compare City of New Braunfels v. Carowest Land, Ltd.*, 549 S.W.3d 163, 173 (Tex. App.—Austin 2017, pet. filed) (concluding that TOMA section 551.142 "set[s] the boundaries of [its] waiver[] of immunity to the express relief provided in the statute[]—injunctive and mandamus relief—and [does not] extend[] the scope of waiver to include the declaratory relief that [the plaintiff] sought and the trial court awarded here") (citing *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 109 (Tex. 2014) (holding that local government code chapter 271 "does not waive immunity from suit on a claim for damages not recoverable" under that chapter)) *with Town of Shady Shores v. Swanson*, 544 S.W.3d 426, 437 n.1 (Tex. App.—Fort Worth 2018, pet. filed) ("[A]lthough TOMA does not broadly waive immunity for all declaratory judgment actions, it does waive immunity for a declaration that an action taken in violation of TOMA is void."). We need not decide the issue here. *See* TEX. R. APP. P. 47.1.

however, that the following claims it raised are not moot: (1) its claim for a "declaration concerning the illegal insufficiency of the notice of the closed session on May 9, 2018, and the illegality of the closed session itself"; (2) its claim for an injunction "to prevent future violations of [TOMA] by [CPA]"; (3) its claims for "an order requiring publication of the certified agenda of the closed session on May 9, 2018" and "a declaration of the illegal inadequacy of the certified agenda of that closed session and of the one that occurred on May 24, 2018"; and (4) its claim for attorney's fees under the Uniform Declaratory Judgments Act (UDJA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West, Westlaw through 2017 1st C.S.).

We disagree. Although the Advocate raises TOMA-based complaints regarding the notice of CPA's May 9, 2018 and May 24, 2018 closed board sessions, the only *actions* which it seeks to "stop, prevent, or reverse" are the decisions to hire and retain Farenthold. *See* TEX. GOV'T CODE ANN. § 551.142(a); *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182–83 (Tex. App.—Corpus Christi 1990, writ denied) (noting that "[t]he intent of the legislature . . . appears to be that only specific acts which violate [TOMA] are subject to being declared void" and holding that "defective notice of a meeting renders voidable only those specific actions which are in violation of [TOMA]"). Because those decisions have already been effectively reversed, there is no live case or controversy involving the May 9 and May 24 board sessions which the trial court could remedy by taking action on the merits. Accordingly, we conclude that all of the Advocate's claims are now moot.

The Advocate also requested an order "prevent[ing] future violations" of TOMA. As noted, TOMA allows a member of the news media to sue to "prevent" a "violation or

threatened violation" of TOMA. *See* TEX. GOV'T CODE ANN. § 551.142(a). Arguably, this specific claim is not moot, technically speaking, because it only seeks prospective relief. However, again, the only actions which the Advocate alleges were violations of TOMA have already been effectively reversed, and it does not allege any "threatened violation" of the statute. *See id*. Accordingly, even assuming the request for an order preventing future TOMA violations is not moot, the trial court nevertheless lacks subject matter jurisdiction over this particular request because the Advocate has not pleaded facts establishing a waiver of CPA's governmental immunity. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *City of Donna*, 548 S.W.3d at 35. Specifically, it has not pleaded that there is any "threatened violation" of TOMA which the trial court should prevent. *See* TEX. GOV'T CODE ANN. § 551.142(a).

III. CONCLUSION

CPA's issues on appeal are sustained. We vacate the trial court's judgment and dismiss the case for want of jurisdiction. *See* TEX. R. APP. P. 43.2(e).

DORI CONTRERAS
Chief Justice

Delivered and filed the
11th day of April, 2019.